

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Time Warner Entertainment Company LP d/b/a)	CSR 6551-E
Time Warner Cable)	
)	
)	
Petition for Determination of Effective Competition)	
in Germantown, Ohio)	

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 2007

Released: January 25, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Entertainment Company LP d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that its cable system serving Germantown, Ohio ("Germantown") is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and is therefore exempt from cable rate regulation in the community listed in Attachment A. The Miami Valley Communications Council (the "Council")³ filed an opposition, to which Time Warner replied.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, Time Warner has met this burden. The Council has failed to rebut it, and, accordingly the petition is granted.

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ The Council is the franchising authority for the Village of Germantown, Ohio.

⁴ 47 C.F.R. § 76.906.

⁵ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁷ Turning to the first prong of this test, we find that the DBS service of DirecTV Inc. ("DirecTV") and DISH Network ("Dish") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the community listed on Attachment A are DBS subscribers, we conclude that the population of the community at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel.¹⁰ We find further that Time Warner has demonstrated that the community is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. In its opposition, the Council objects to Time Warner's showing on the second element of the competing provider test. The Council contends that, although Time Warner alleges that the 15 percent test is met because 29 percent of households in Germantown subscribe to DBS service, this assertion is incorrect.¹¹ It argues that Time Warner has not conducted an actual count of the number of competing MVPD subscribers in the franchise area and instead relies on the five-digit zip code allocation formula, which is inaccurate data regarding the number of DBS subscribers in Germantown.¹² The Council states that because the five-digit zip code for Germantown encompasses not only the households in Germantown but households in portions of Montgomery County surrounding Germantown, the report does not actually provide information regarding the number of DBS subscribers in Germantown.¹³ The Council also states that Germantown is a small village surrounded by a large rural area, and DBS penetration rates tend to be higher in rural areas, but Time Warner's allocation method fails to account for this.¹⁴ The Council asserts that its executive director drove down every street in the Village of Germantown, personally counted every

⁷ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹ *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, 21 FCC Rcd 2503 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹⁰ *See* 47 C.F.R. § 76.905(g).

¹¹ Council Opposition at 3.

¹² *Id.*

¹³ *Id.* at 4.

¹⁴ *Id.*

satellite dish he could find, and the count disclosed a total of 239 satellite antennas.¹⁵ Thus, the Council argues that by actual count, it appears that approximately 12.6 percent of Germantown residents may subscribe to DBS service, far less than 29 percent, and less than the 15 percent required by the effective competition test.¹⁶ Although the Commission has accepted it in the past, the Council argues that the formula is flawed in the instant case.¹⁷ In addition, the Council asserts that cable operators should be required to submit zip code plus four data.¹⁸

5. In its Reply, Time Warner explains that the methodology compares U.S. Census household data for a franchise area with Postal Service household data supplied by Media Business Corporation, for any 5-digit zip code encompassing all or part of that franchise area to derive an “allocation ratio.”¹⁹ That ratio is then applied against a direct-to-home subscriber count supplied by the Satellite Broadcasting and Communications Association for such 5-digit zip code areas to determine the number of direct-to-home subscribers properly allocable to a franchise area.²⁰ That number is then divided by the franchise area’s U.S. Census household population, yielding the direct-to-home penetration rate attributable to that particular franchise area.²¹ Time Warner asserts that although the Council attacks the use of this methodology to demonstrate the extent of DBS competition in Germantown, the Council acknowledges the fact that use of this methodology has been repeatedly affirmed by the Commission in cases and there is no reason for the Commission to reach any different conclusion here.²² Moreover, Time Warner argues that a hand count of DBS satellite dishes is simply not an accurate means for determining the number of DBS customers in a given franchise area, as it would be unlikely that satellite dishes always would be plainly visible from the street.²³ Also, Time Warner points out that the person conducting the count might have erred.²⁴ With regard to using zip+4 data, Time Warner states that while an alternative allocation methodology that uses zip+4 data has been used by some cable operators, the Commission does not require that such data be utilized and has stated that the five-digit zip code data and the zip+4 data are accurate and acceptable means to demonstrate effective competition within a franchise area.²⁵

6. The Council’s argument regarding the percentage of DBS subscribers in the franchise area and its visual count of subscriber satellite dishes fails to rebut Time Warner’s evidentiary showing

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 6.

¹⁹ Time Warner Reply at 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3. See *Charter Communications Properties, LLC, Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (CSB 2002); *Time Warner- Advance/Newhouse Partnership, d/b/a Time Warner Cable, Petition for Determination of Effective Competition in Thirty-Three North Carolina Communities*, 20 FCC Rcd 5225 (MB 2005).

²³ Time Warner Reply at 5

²⁴ *Id.*

²⁵ *Id.* at 5-6 citing *Charter Communications* 19 FCC Rcd 6878, 6881 (MB 2004)(although the Commission accepts zip code plus four data, it has not expressed a preference for one form of data over another and accepts five digit zip code data as reliable for purposes of determining effective competition).

regarding DBS penetration figures. As stated, although the Commission accepts zip code plus four data, it has not expressed a preference for one form of data over another and accepts five digit zip code data as reliable for purposes of determining effective competition.²⁶ Therefore, the established methodology utilized by Time Warner for demonstrating that effective competition exists in Germantown under the 15 percent element of the competing provider test continues to be acceptable. Regarding the number of DBS subscribers, we believe that the Council's visual survey offers some insight into the subscriber count, but it is highly possible that some dishes were missed due to the placement of satellite dishes behind houses or in other obstructed areas for aesthetic purposes. In this regard, we find the Council's visual dish survey to be less reliable than the approved allocation methodology.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner sought to determine the competing provider penetration in the franchise area by using a subscriber tracking report that identified the number of subscribers attributable to the DBS providers within the Community on a zip code basis. Time Warner asserts that it is the largest MVPD in the Community because its subscribership exceeds the aggregate DBS subscribership for that franchise area. Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the franchise area set forth on Attachment A is subject to competing provider effective competition.

²⁶ See *Charter Communications, Inc. on behalf of Falcon Cable Media, a California Limited Partnership; Charter Communications VI, LLC; and Interlink Communications Partners, LLC*, Petition for Determination of Effective Competition in Eight Virginia Communities, 19 FCC Rcd 6878 (MB 2004).

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition filed by the Cable Operator listed on Attachment A for a determination of effective competition in the Community listed thereon **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the local franchising authority overseeing the Cable Operator **IS REVOKED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

²⁷47 C.F.R. § 0.283.

Attachment A

Cable Operator Subject to Competing Provider Effective Competition**TIME WARNER ENTERTAINMENT COMPANY LP d/b/a TIME WARNER CABLE:
CSR 6551-E**

Communities	CUIDS	2000 Census CPR*	DBS Households⁺	Subscribers⁺
Germantown	OH1051	29.00%	550	1898

CPR= Percent DBS penetration

+ = See Cable Operator Petitions